

CHAPTER 6

ADMINISTRATIVE LAW

I. Conscientious Objectors	IV. Reports of Survey
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I. CONSCIENTIOUS OBJECTORS

References

50 U.S.C. App. § 456(j) (West 1990) (the Military Selective Service Act: Deferments and Exemptions from Training and Service).
DoD Dir. 1300.6, *Conscientious Objection*, 20 Aug 1971, w/C4, 11 Sep 75; 32 CFR Part 75.
AR 600-43, *Conscientious Objection*, 15 May 1998.
AR 614-30, *Assignments, Details and Transfers: Overseas Service*, 30 August 2001.
AFI 36-3204, *Procedures for Applying as a Conscientious Objector*, 15 July 1995.
Navy: MILPERSMAN 1900-020, *Convenience of the Government Separation Based on Conscientious Objection (Enlisted and Officers)*, JAN. 2000.
Marine Corps Order 1306.16E, *Conscientious Objectors*, 21 Nov 86.

Definition

Members of the Armed Forces who have “a firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and belief” may apply for Conscientious Objector (CO) status. Supreme Court decisions have expanded “religious training and belief” to include any moral or ethical belief system held with the strength of conventional religious convictions.

Classes of Conscientious Objectors

1. Class 1-O: A service member who, by reason of conscientious objection, sincerely objects to participation of any kind in war in any form.
2. Class 1-A-O: A service member who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions permit military service in a non-combatant status.

Neither category of CO status will be granted when requests are:

- Based on a CO claim that existed, but was not presented, prior to notice of induction, enlistment, or appointment. Claims arising out of experiences before entering military service, however, that did not become fixed until after entry, will be considered.
- Based solely upon policy, pragmatism, or expediency.
- Based on objection to a certain war.
- Based upon insincere beliefs.
- Based solely on CO claim that was denied by the Selective Service System.

Standard of Proof

The applicant for CO status must prove by “clear and convincing” evidence that:

- 1) the basis of the claim satisfies the definition and criteria for CO; and
- 2) his or her belief is honest, sincere, and deeply held.

Once the soldier makes this *prima facie* showing, the military service must grant the application unless the administrative record shows affirmative written evidence supplying a “basis in fact” for denial of the application. A 1-O applicant cannot be granted 1-A-O status as a compromise, nor can 1-A-O applicants be discharged (AR 600-43; *but see* 32 CFR Part 75.7b).

Procedural Requirements

The applicant will be counseled by his or her commander and interviewed by a chaplain and psychiatrist (or other medical officer). The commander’s recommendations and the chaplain’s and psychiatrist’s findings are forwarded with the application to the Special Court-Martial Convening Authority, who appoints an investigating officer (IO). The IO conducts a hearing at which the applicant may appear and present evidence. The IO prepares a written report, and forwards it to the General Court-Martial Convening Authority (GCMCA). Army GCMCAs may approve 1-A-O status. The GCMCA must forward to HQDA any applications for 1-O status and any applications for 1-A-O status upon which he or she recommends disapproval. Approval authorities for other services vary.

A soldier who receives individual orders for reassignment or who has departed his unit in compliance with individual reassignment orders may not apply for CO status until he arrives at the new duty station. This policy does not apply to soldiers who are TDY en route for a period in excess of 8 weeks. These soldiers may apply at their TDY duty station.

On the other hand, a soldier who is assigned or attached to a unit that has unit reassignment instructions (i.e., the unit is deploying) may submit an application for conscientious objector status. The unit must process the application as operational and mission requirements permit. The soldier must continue to prepare for deployment and will deploy with the unit unless the soldier’s application has been approved. If the soldier’s application has been forwarded to the DA Conscientious Objector Review Board (DACORB), the GCMCA may excuse the soldier from deployment. Contact the DACORB and determine the status of the application before the GCMCA excuses the soldier (DACORB: DSN 221-8671 / 8672 or commercial (703) 325-8671 / 8672).

In the case of RC soldiers, not on active duty, the submission of an application after publication of orders to report for AD or ADT, will not serve as a basis to delay reporting (AR 600-43, para. 2-10). If the soldier applies for CO status before AD or ADT orders are issued and the soldier’s application cannot be processed before the soldier’s reporting date, the soldier must comply with the orders (the application must, however, be sent to the proper Active Army GCMCA for processing). Members of the IRR may submit CO applications at their mobilization stations (AR 600-43, I01). Submission will not preclude further assignment or deployment during processing of the application.

II. GIFTS

First, determine whether the gift is to the government (DoD/individual Services) or to an individual.

Gifts To DoD And The Services

Gifts to the Services are governed by statute and implementing regulations. The two primary gift statutes that authorize the Services to accept gifts are 10 USC §§ 2601 (Individual Services) & 2608 (DoD). For the Army, AR 1-100 implements § 2601 and allows acceptance of gifts to be used for a school, hospital, library, museum, cemetery, or other similar institution. A local commander can accept unconditional gifts valued up to \$1,000. Conditional gifts or gifts valued over \$1,000 may be accepted only by the Secretary of the Army. POC is Mr. Jim Davis, (703) 325-4530. Also, AR 1-101 addresses gifts given to the Army for distribution to individuals. This regulation requires the donor to pay

transportation costs and prohibits Army endorsement of the donor. For gifts to the Air Force and Navy see AFI 51-601, Gifts to Dep't of the Air Force, SECNAVINST 4001.2G, Acceptance of Gifts, and OPNAVINST 4001.1D.

The broadest gift acceptance authority for the Services is contained in 10 U.S.C. § 2608. It was passed shortly after Operation Desert Shield/Storm and applies to all of DoD. Neither the Army or Navy have implemented it by regulation. DoD has implemented this section in the Financial Management Regulation, DoD 7000.14-R, Volume 12, Chapter 3. The statute allows DoD to accept money or property from any person, and services from a foreign government or international organization, for use in any DoD program. DoD has delegated authority to accept gifts of property to Service Secretaries. All gifts of money must be processed through the DoD Comptroller. Additionally, all gifts of money must be deposited in the Defense Cooperation Account and cannot be expended until reappropriated by the Congress. The Air Force has implemented this statute, in AFI 51-601, Gifts to Dep't of the Air Force, Chapter 4.

In the Army, commanders have much more local gift acceptance authority if the command accepts the gift for its nonappropriated fund instrumentalities or Installation Morale, Welfare, and Recreation Fund. AR 215-1, para 7-39, authorizes NAFI fund managers to accept gifts to MWR up to \$5,000; local commanders up to \$25,000; and MACOM commanders up to \$50,000. Gifts over \$50,000 must be processed through the Army Community and Family Support Center, Alexandria, Virginia. Military personnel may not solicit gifts for the NAFI but may make the NAFI's needs known in response to inquiries from prospective donors. See also, AFI 34-201, SECNAVINST 4001.2G, and OPNAVINST 4001.1D.

Gifts To Individuals

The Joint Ethics Regulation (JER), DoD 5500.7-R, Chapter 2, generally governs acceptance of gifts to individuals. The JER may not be supplemented without approval of the DoD General Counsel. (The JER and the JAG School's Ethics Deskbook may be found in the SOC Database on JAGCNet as well as the DoD SOCO web site, http://www.defenselink.mil/dodgc/defense_ethics/.) The primary issue regarding gifts to individuals is determining who is the gift-giver (and who is paying for the gift). Different rules apply depending upon whether the gift is from a foreign government, from an outside source (outside the Federal Government), or from fellow soldiers or DoD/DA civilians (between federal employees). To avoid any problems in this area, ask your appointed Ethics Counselor for advice either before receipt or shortly after receipt of the gift.

Gifts To Individuals From Foreign Governments

There is a general Constitutional prohibition against any federal employee receiving any gift from a foreign government or its representatives. A gift from a foreign government includes a gift from the national, state, or local governmental entity. Article 1, section 9 prohibits a federal employee from accepting any "present or emolument" from a foreign government unless authorized by Congress. Congress has authorized, in 5 U.S.C. § 7342, the acceptance of gifts of "minimal value." Minimal value changes every three years as determined by the Consumer Price Index. Currently, minimal value is \$260. This figure is scheduled to be revised in 2002.

The rules allow a federal employee to personally accept a gift given by a foreign governmental representative if the gift is worth \$260 or less. Each level of the foreign government (separate sovereigns) has a \$260 limit. The value of the gift is based upon the retail value of the gift in U.S. Dollars, in the United States, at the time of acceptance. Retail value can be determined through like items sold at AAFES, from the Claims Office, or formal appraisals (which may be funded by the command). These rules apply to foreign gifts received in foreign countries or in the U.S. **To determine what is a "gift," look to 5 U.S.C. § 7342, and the DoD Directive on foreign gifts, DoDD 1005.13, and do not look to the gift definitions contained in the Standards of Conduct rules found in the Joint Ethics Regulation.** For the Army's rules on acceptance of foreign awards and decorations, see AR 600-8-22, chapter 9; Air Force rules are at AFI 51-901; Navy/USMC, see SECNAVINST 1650.1G, Chapter 7.

If the gift is valued at more than \$260, then the employee must forward a report through the chain of command to DA PERSCOM (for Army personnel). POC is Mr. Jim Davis, the same POC as for Gifts to the Army (see above). (AF POC is AFPC/DPPPRS, 550 C. St. West, Suite 12, (Attn: Ms. Garsford), Randolph AFB, 78150-4714; for Navy and USMC, report to and deposit gifts in accordance with SECNAVINST 1650.1G, Chapter 7.) Gifts of more than \$260 become government property. The employee can forward the gift with the report to PERSCOM, who will likely pass the gift on to the General Services Administration for sale at a public auction. The employee can also forward the report without the

gift and ask that the gift, now government property which should be entered on the property books, be retained for use or permanent display at the employee's agency. If there is no federal requirement for the property, as determined by GSA, the employee may purchase the gift for fair market value, before it is auctioned off.

A gift from a foreign government, even one valued at more than \$260, may be accepted when refusal may embarrass the U.S. or could adversely affect foreign relations. In such cases, the employee should accept the gift on behalf of the U.S. and then report the gift in accordance with Service regulations.

There are several other variations of the rule. For multiple gifts given at a presentation ceremony, the employee may accept those gifts whose aggregate value is \$260 or less, per sovereign. The gift(s) which in the aggregate exceed the \$260 limit may not be kept by the individual. Gifts given to the spouse of a federal employee by a foreign official are considered to be gifts to the employee, and gifts given by the spouse of a foreign official are considered to be gifts from the foreign official. Gifts which are paid for by a foreign government are foreign gifts; gifts which are paid for from a foreign individual's personal funds are not foreign gifts. For example, if the foreign employee is giving the federal employee the gift as an act of personal friendship and the foreign employee is bearing the cost of the gift, then the foreign gift rules do not apply. In this case, the rules regarding gifts from outside sources or gifts between employees may apply.

Gifts To Individuals - Handling Improper Gifts

If a gift has been improperly accepted, the employee may pay the donor its market value or return the gift. With approval, perishable items may be donated to charity, shared within the office, or destroyed. See your Ethics Counselor as necessary.

III. OFFICIAL COURTESIES, INCLUDING GIFTS, TO FOREIGN GOVERNMENTS AND PERSONNEL.

References

DoD Directive 7250.13, *Official Representation Funds*, 23 February 1989, w/C5, 3 March 1995.

AR 37-47, *Representation Funds of the Secretary of the Army*, 31 May 1996.

AFI 65-603, *Official Representation Funds – Guidance and Procedure*, 30 January 2002

SECNAVINST 7042.7J, *Guidelines for Use of Official Representation Funds (ORF)*, 5 November 1998.

CJCSI 7201.01, *Combatant Commanders Official Representation Funds*, 15 August 1999.

Funding Source

Official Representation Funds (ORFs) are a category of Emergency and Extraordinary Expense Funds appropriated annually in the Operation and Maintenance, Army (OMA) account. See, Chapter 12 for a general explanation of Emergency and Extraordinary Expense Funds. Limitation .0012 are ORFs specifically designated for official courtesies and other representation expenses as described in DODD 7250.13 and applicable Service regulations (see, References). Each fiscal year, DA furnishes Letters of Authority to commands authorized to expend ORFs. Joint Commands receive ORFs through CINC channels in accordance with CJCSI 7201.01.

Who are Authorized Guests ?

“Authorized guests” include foreign citizens whose rank, position, function, or stature justify official entertainment, such as distinguished citizens, military personnel, and government officials. Authorized guests also include national or regional dignitaries, citizens committees, and prominent citizens of local communities who make a substantial contribution to the nation or DOD. The latter category applies particularly in foreign countries where training exercises, maneuvers, community relations programs, and associated military/civilian activities are conducted throughout the local community.

What are Official Courtesies?

“Official courtesies” include hosting authorized guests to maintain the standing and prestige of the U.S. at home and abroad; luncheons, dinners, receptions, and participation expenses at DOD-sponsored events held in honor of authorized

guests; entertainment of local authorized guests required to maintain civil or community relations; receptions for local authorized guests to meet with newly assigned commanders or appropriate senior officials; entertainment of authorized guests incident to visits by U.S. vessels to foreign ports; official functions, floral wreaths, decorations, and awards in observance of foreign national holidays and similar occasions taking place in foreign countries; and dedications of facilities. All official courtesies are subject to ratio limitations of authorized guests and members of their party to DOD personnel, as set forth in the Service regulation. AR 37-47, AFI

Giving Gifts to Authorized Guests

Limitation .0012 ORFs may be used to purchase gifts, mementos, or tokens to present to authorized guests in connection with official courtesies. Gifts presented under this authority will cost no more than the amount authorized in DODD 7250.13. Gifts may only be presented by commanders who have a Letter of Authority from DA, and installation commanders. With prior written permission from one of these senior officials, subordinate officials under a presenting officials command or supervision may present a gift on the senior official's behalf. The authority may not be further delegated. Gift items procured in bulk may not include the presenting official's name unless the official is the SA, CSA, or the SGM of the Army. This does not prohibit the specific inscribing or engraving of a single item individually selected for a certain presentation or occasion. ORFs cannot be used for the presentation to, or acceptance by, DOD personnel of mementos of any kind.

IV. REPORTS OF SURVEY

References

AR 735-5, Policies and Procedures for Property Accountability, 31 Jan. 1998
AR 600-4, Remission of Indebtedness for Enlisted Members, 1 Apr. 1998.
AR 15-185, Army Board for the Correction of Military Records, 29 Feb 2000.
AR 25-50, Preparing and Managing Correspondence, 5 Mar. 01.
AR 15-6, Procedures for Investigating Officers and Boards of Officers, 30 Sep. 96
DA Pam 735-5, Survey Officer's Guide, 1 Mar. 97
DA Pam 710-5, Unit Commander's Supply Handbook, 15 Apr. 87
www.usapa.army.mil (official Army regulation and pamphlet website).
Air Force Manual 23-220, Reports of Survey of Air Force Property, 1 July 1996.

A. INTRODUCTION - The Report of Survey, DA Form 4697, has three purposes. It documents circumstances surrounding loss or damage to government property, serves as a voucher for adjusting property records, and documents a charge of financial liability, or provides for relief of financial liability. Imposition of liability is a purely administrative process that is designed to promote a high degree of care for Army property through deterrence. It is not a punitive program - commanders should consider other administrative, nonjudicial or judicial sanctions if damage or loss of property involves acts of misconduct.

B. REPORT OF SURVEY SYSTEM.

1. Alternatives to Reports of Survey that Commanders Should Consider.

- a. Statement of Charges/Cash Collection Voucher (consolidated on DD Form 362) when liability is admitted and the charge does not exceed one month's base pay.
- b. Cash sales of hand tools and organizational clothing and individual equipment.
- c. Unit level commanders may adjust losses of durable hand tools up to \$100 per incident, if no negligence or misconduct is involved.
- d. Abandonment order may be used in combat, large-scale field exercises simulating combat, military advisor activities, or to meet other military requirements.

- e. Recovery of property unlawfully held by civilians is authorized - show proof it is U.S. property and do not breach the peace.
 - f. AR 15-6 investigations and other collateral investigations can be used as a substitute for the report of survey investigation.
 - g. If the commander determines that no negligence was involved in the damage to the property, no report of survey is required as long as the approving authority concurs.
2. Initiating a Report of Survey.
- a. Active Army commanders will initiate the report of survey within **15 calendar days** of discovering the loss or damage. Reserve Component commanders will initiate a report of survey within **75 calendar days** and National Guard commanders will initiate a report of survey within **45 calendar days**.
 - b. The goal is a thorough investigation.
 - c. Mandatory requirements for a report of survey or AR 15-6 investigation. (*See also* AR 190-11, app. E)
 - (1) Individual refuses to admit liability by signing a statement of charges, cash collection voucher or other accountability document, and negligence or misconduct is suspected.
 - (2) Anytime a higher authority or other DA regulations directs a report of survey.
 - (3) Whenever a sensitive item is lost or destroyed.
 - (4) Property is lost by an outgoing accountable officer, unless voluntary reimbursement is made for the full value of the loss.
 - (5) When the amount of loss or damage exceeds an individual's monthly base pay, even if liability is admitted.
 - (6) When damage to government quarters or furnishings exceeds one month's base pay.
 - (7) When the loss involves certain bulk petroleum products.
 - d. In the Active Army, reports of survey will normally be processed within **75 days**. Reports of survey in the National Guard will normally be processed within **150 days**; in the U.S. Army Reserves, **240 days**.
3. Approving Authority.
- a. The approving authority is normally the battalion or brigade commander, but it may be any commander, chief of a HQDA staff agency, director of a MACOM staff office, or chief of a separate MACOM activity in the grade of LTC or higher, or a DA Civilian employee in a supervisory position in the grade of GS-14 or above. The approving authority does not have to be a court-martial convening authority.
 - b. Regardless of who initiates the report of survey, it is processed through the chain of command of the individual responsible for the property at the time of the incident if the individual is subject to AR 735-5.
 - c. If negligence is clearly established on the report of survey, the approving authority may recommend liability without appointing a surveying officer. The approving authority is then responsible for ensuring that the charges are properly computed and the individual against whom liability is recommended is properly notified and given an opportunity to respond.

4. Appointing Authority.
 - a. The appointing authority may be a lieutenant colonel or colonel, or U.S. DOD civilian employee in the grade of GS-13 or above (or a major or GS-12 filling a position of a lieutenant colonel or GS-13).
 - b. The appointing authority appoints report of survey investigating officers. The appointing authority also reviews all reports of survey arising within his or her command or authority.
5. Surveying Officer.
 - a. The surveying officer will be senior to the person subject to possible financial liability, “except when impractical due to military exigencies.”
 - b. The surveying officer can be an Army commissioned officer; warrant officer; or noncommissioned officer in the rank of Sergeant First Class or higher; a civilian employee GS-07 or above; a commissioned officer of another service; or a Wage Leader (WL) or Wage Supervisor (WS) employee. In joint activities, DOD commissioned or warrant officers, or noncommissioned officers in the grade of E-7 or above, qualify for appointment as survey officers.
 - c. Consult AR 600-8-14, Table 8-1, for the grade equivalency between military personnel and civilian employees.
 - d. The investigation is the surveying officer’s primary duty.
 - e. The surveying officer should get a briefing from a judge advocate.
6. Legal Considerations for Imposing Liability. (AR 735-5, app. C)
 - a. Standard of liability.
 - (1) Simple negligence - the failure to act as a reasonably prudent person would have acted under similar circumstances.
 - (a) A reasonably prudent person is an average person, not a perfect person. Consider also:
 - (i) The person’s age, experience, and special qualifications.
 - (ii) The type of responsibility involved.
 - (iii) The type and nature of the property. More complex or sensitive property normally requires a greater degree of care.
 - (b) Examples of simple negligence.
 - (i) Failure to do required maintenance checks.
 - (ii) Leaving weapon leaning against a tree while attending to other duties.
 - (iii) Driving too fast for road or weather conditions.
 - (iv) Failing to maintain proper hand receipts.
 - (2) Gross negligence - an extreme departure from the course of action expected of a reasonably prudent person, all circumstances being considered, and accompanied by a reckless, deliberate, or wanton disregard for the foreseeable consequences of the act.

- (a) Reckless, deliberate, or wanton.
 - (i) These elements can be express or implied.
 - (ii) Does not include thoughtlessness, inadvertence, or error in judgment.
- (b) Foreseeable consequences.
 - (i) Does not require actual knowledge of actual results.
 - (ii) Need not foresee the particular loss or damage that occurs, but must foresee that some loss or damage of a general nature may occur.
- (c) Examples of gross negligence.
 - (i) Soldier drives a vehicle at a speed in excess of 40 mph of the posted speed limit. Intentionally tries to make a sharp curve without slowing down.
 - (ii) Soldier lives in family quarters and has a child who likes to play with matches. Soldier leaves matches out where child can reach them.
- (3) Willful misconduct - any intentional or unlawful act.
 - (a) Willfulness can be express or implied.
 - (b) Includes violations of law and regulations such as theft and misappropriation of government property.
 - (c) A violation of law or regulation is not negligence *per se*.
 - (d) Examples of willful misconduct.
 - (i) Soldier throws a tear gas grenade into the mess tent to let the cooks know what he thought about breakfast, and, as a result, the tent burns to the ground.
 - (ii) Soldier steals a self-propelled howitzer, but he does not know how to operate it. Accordingly, his joy ride around post results in damage to several buildings.
- (4) Proximate cause - the cause which, in a natural and continuous sequence, unbroken by a new cause, produces the loss or damage, and without which the loss or damage would not have occurred. It is the primary moving cause, or the predominating cause, from which the injury follows as a natural, direct, and immediate consequence, and without which it would not have occurred.
 - (a) The damage arises out of the original act of negligence or misconduct.
 - (b) A continual flow or occurrence of events from the negligent act or misconduct.
 - (c) Use common sense.
 - (d) Examples of proximate cause.
 - (i) Soldier driving a vehicle fails to stop at a stop sign and strikes another vehicle after failing to look. Proximate cause is the soldier's failure to stop and look.

- (ii) Soldier A illegally parks his vehicle in a no parking zone. Soldier B backs into A's vehicle. B did not check for obstructions to the rear of his vehicle. A's misconduct is not the proximate cause of the damage. Instead, B's negligent driving is the proximate cause.
- (5) Independent intervening cause - an act that interrupts the original flow of events or consequences of the original negligence. It may include an act of G-d, criminal misconduct, or negligence.
- (6) Joint negligence or misconduct - two or more persons may be held liable for the same loss.
 - (a) There is no comparative negligence.
 - (b) The financial loss is apportioned according to AR 735-5, Table 12-4.
- b. Loss. There are two types of losses that can result in financial liability.
 - (1) Actual loss. Physical loss, damage or destruction of the property.
 - (2) Loss of accountability. Due to the circumstances of the loss, it is impossible to determine if there has been actual physical loss, damage, or destruction because it is impossible to account for the property.
- c. Responsibility for property.
 - (1) Command responsibility.
 - (a) The commander has an obligation to insure proper use, care, custody, and safekeeping of government property within his or her command.
 - (b) Command responsibility is inherent in command and cannot be delegated. It is evidenced by assignment to command at any level.
 - (2) Direct responsibility.
 - (a) An obligation of a person to ensure the proper use, care, custody, and safekeeping of all government property for which the person is receipted.
 - (b) Direct responsibility is closely related to supervisory responsibility, which is discussed below.
 - (3) Personal responsibility. The obligation of an individual for the proper use, care, and safekeeping of government property in his possession, with or without a receipt.
 - (4) Supervisory responsibility.
 - (a) The obligation of a supervisor for the proper use, care, and safekeeping of government property issued to, or used by, subordinates. It is inherent in all supervisory positions and is not contingent upon signed receipts or responsibility statements.
 - (b) If supervisory responsibility is involved, consider the following additional factors.
 - (i) The nature and complexity of the activity and how that affected the ability to maintain close supervision.
 - (ii) The adequacy of supervisory measures used to monitor the activity of subordinates.

- (iii) The extent supervisory duties were hampered by other duties or the lack of qualified assistants.
- (5) Custodial responsibility.
 - (a) The obligation of an individual for property in storage awaiting issue or turn-in to exercise reasonable and prudent actions to properly care for and ensure proper custody and safekeeping of the property.
 - (b) When unable to enforce security, they must report the problem to their immediate supervisor.
- 7. Determining the Amount of Loss.
 - a. If possible, determine the actual cost of repair or actual value at the time of the loss. The preferred method is a qualified technician's two-step appraisal of fair market value. The first step involves a determination of the item's condition. The second step is to determine the commercial value of the item given its condition.
 - b. If other means of valuation are not possible, consider depreciation. Compute the charge according to AR 735-5, Appendix B.
 - c. Limits on financial liability.
 - (1) The general rule is that an individual will not be charged more than one month's basic pay.
 - (a) Charge is based upon the soldier's basic pay at the time of the loss.
 - (b) For ARNG and USAR personnel, basic pay is the amount they would receive if they were on active duty.
 - (2) As exceptions to the general rule, there are times when personnel are liable for the full amount of the loss.
 - (a) Any person is liable for the full loss to the Government (less depreciation) when they lose, damage, or destroy personal arms or equipment.
 - (b) Any person is liable for the full loss of public funds.
 - (c) Accountable officers will be held liable for the full amount of the loss.
 - (d) Any person assigned government quarters is liable for the full amount of the loss to the quarters, furnishings, or equipment as a result of gross negligence or willful misconduct of the responsible individual, his guests, dependents, or pets.
- 8. Rights of Individual for Whom Financial Liability is Recommended.
 - a. The report of survey form (DA Form 4697) contains a rights notice; however, to adequately inform an individual of his or her rights. AR 735-5, para. 13-40 and Figure 13-11.
 - b. If financial liability is recommended, the surveying officer must take the following actions.
 - (1) Give the person an opportunity to examine the report of investigation.
 - (2) Ensure the person is aware of rights.

- (3) Fully consider and attach any statement the individual desires to submit.
- (4) Carefully consider any new or added evidence and note that the added evidence has been considered.
- (5) Explain the consequences of a finding of gross negligence for a survey involving government quarters, furnishings and equipment.

9. Duties of the Approving Authority.

- a. If the survey officer recommends liability, a judge advocate must review the adequacy of the evidence and the propriety of the findings and recommendations before the approving authority takes action.
- b. The approving authority is not bound by the surveying officer's or judge advocate's recommendations.
- c. If the approving authority decides to assess financial liability contrary to the recommendations of the surveying officer or judge advocate, that decision and its rationale must be in writing.
- d. If considering new evidence, the approving authority must notify the individual and provide an opportunity to rebut.
- e. The approving authority must ensure that the individual was advised of rights.
- f. Initiate collection action by sending documentation to the servicing finance office.
- g. The approving authority may request that a charge be prorated beyond 2 months.

10. Involuntary Withholding of Current Pay.

- a. Members of the armed forces may have charges involuntarily withheld. 37 U.S.C. §1007.
- b. Involuntary withholding for civilian employees. 5 U.S.C. § 5512, AR 37-1, Ch. 15)
- c. No involuntary withholding for the loss of NATO property (DAJA-AL 1978/2184).
- d. No involuntary withholding for the loss of MFO property.

C. RELIEF FROM REPORTS OF SURVEY.

1. Appeals.

- a. The appeal authority is the next higher commander above the approving authority. *See also* AR 735-5, para. 13-49 (explaining delegation authority).
- b. Individual has 30 days to appeal unless he or she shows good cause for an extension.
- c. Appeal is submitted to approving authority for reconsideration before action by the appeal authority.
- d. If the approving authority denies reconsideration the following actions are required:
 - (1) Prepare a memorandum giving the basis for denying the requested relief.
 - (2) The approving authority must personally sign the denial.
 - (3) The action must be forwarded to the appeal authority within 15 days.

- e. Action by the appeal authority is final.
 - f. Issues on appeal.
 - (1) Survey not initiated within 15 calendar days after discovery of the loss as required by AR 735-5. Time limits are for the benefit of the government. This is a factor to consider, but insufficient basis in and of itself to grant the appeal.
 - (2) Surveying officer was not senior to the person held financially liable as required by AR 735-5. Purpose of the requirement is to prevent a “chilling effect” on the surveying officer. If senior individual is held liable, then the purpose of the regulation has been met. Deny the appeal.
 - (3) Rights warning not given by the surveying officer. This is an administrative procedure. A failure to warn does not invalidate the survey. This is a factor to consider, but insufficient basis in and of itself to grant the appeal.
 - (4) Surveying officer does not complete the investigation within 30 days as required by AR 735-5. Some investigations may take longer than others. This is a factor to consider, but insufficient basis in and of itself to grant the appeal.
 - (5) Survey not processed through the chain of command of the person responsible for the property at the time of the loss as required by AR 735-5. This a purely administrative requirement and harmless error. Deny the appeal.
2. Re-opening Reports of Survey.
- a. Not an appeal.
 - b. Authority to reopen rests with the approval authority.
 - c. May occur:
 - (1) As part of an appeal of the assessment of financial liability.
 - (2) When a response is submitted to the surveying officer from the person charged subsequent to the approving authority having assessed liability.
 - (3) When a subordinate headquarters recommends reopening based upon new evidence.
 - (4) When the property is recovered.
 - (5) When the approving authority becomes aware that an injustice has been perpetrated against the government or an individual.
3. Remission of Indebtedness. AR 735-5 and AR 600-4.
- a. Enlisted soldiers only.
 - b. Only to avoid extreme hardship.
 - c. Only unpaid portions can be remitted. Suspend collection action long enough for the soldier to submit his request for remission of the debt.
4. Army Board for the Correction of Military Records (ABCMR). AR 15-185.

5. Civilian employees may avail themselves of the grievance/arbitration procedures.

D. STAFF JUDGE ADVOCATE'S REVIEW.

1. For the Approving Authority: adequacy of evidence and propriety of findings and recommendations.
2. For the Appeal Authority: evidence is adequate and findings are proper.
3. The same attorney cannot perform both legal reviews.

- E. CONCLUSION - Commanders must ensure that the Report of Survey process is fair and uniform in its treatment of agency members. Liability of individuals responsible for property (whether based on command, supervisory, direct or personal responsibility) should be fully considered. Legal advisors should get involved early in the process to help commanders and survey officers focus their investigations, and to ensure that individual rights are addressed before imposition of liability.

V. ADMINISTRATIVE INVESTIGATIONS

References

Army:

Administrative Investigations: AR 15-6, Procedure for Investigating Officers and Boards of Officers, 11 May 1988 w/Ch. 30 September 1996.
Safety Investigations: AR 385-40, Accident Reporting and Records, 1 November 1994.
Reports of Survey: AR 735-5, Policies and Procedures for Property Accountability, 31 January 1998.
Line of Duty: AR 600-8-1, Army Casualty and Memorial Affairs and Line of Duty Investigations, 18 September 1986 (an expired regulation in temporary use pending replacement).
Flying Evaluation Boards: AR 600-105, Aviation Service of Rated Army Officers, 15 December 1994.
Conscientious Objection: AR 600-43, Conscientious Objection, 15 May 1998.
Information Security: AR 380-5, Department of the Army Information Security Program, 25 February 1988.

Air Force:

Accident/Mishap Investigation Boards. AFI 51-503, Aircraft, Missile, Nuclear, and Space Accident Investigations, 1 December 1998.
Safety Investigation Boards. AFI 91-204, Safety Investigations and Reports, 29 November 1999.
Information Security. AFI 31-401, Information Security Management, 1 January 1999.
Line of Duty. AFI 36-2910, Line of Duty (Misconduct) Investigations, 15 August 1994.
Reports of Survey. AFMAN 23-220, Reports of Survey for Air Force Property, 1 July 1996.
Conscientious Objectors. AFI 36-3204, *Procedures for Applying as a Conscientious Objector*, 15 July 1994

Navy

Aviation accident investigations. Naval Aviation Safety Program, OPNAVINST 3750.6R.
Safety Investigations. Afloat: Navy Occupational Safety and Health (NAVOSH) Program Manual for Forces Afloat, OPNAVINST 5100.19 D with change 1.
Ashore: NAVOSH Program Manual, OPNAVINST 5100.23 E.
Line of duty. JAGINST 5800.7C w/chgs 1-3 (Manual of the Judge Advocate General), paras. 0221-0241.
Loss of property. JAGINST 5800.7C w/chgs 1-3 (Manual of the Judge Advocate General), para. 0250.

Procedure for Investigating Officers and Boards of Officers

Army Regulation 15-, 6 (Procedure for Investigating Officers and Boards of Officers) contains the basic rules for Army regulatory boards. Many boards, however, are appointed under a specific regulation or directive (e.g., AR 635-200 provides for the appointment of boards to consider the separation of enlisted personnel). In that case, the provisions of the specific regulation or directive will control the proceedings. Often, that specific regulation will have a provision that makes AR 15-6 applicable to the proceedings. Consequently, you may have to look to both the specific regulation involved and to AR 15-6 for the proper board procedures. If the two regulations conflict on a particular point, the provisions of the specific regulation authorizing the board will override the provisions of AR 15-6.

The Air Force has no single regulation or instruction governing non-IG investigations. Some types of investigations may be specifically authorized by instruction (for example, AFI 36-3208, *Administrative Discharge of Airmen*). In any event, the ability to initiate a command-directed investigation flows from the commander's inherent authority.

In the Navy and Marine Corps, the main reference for administrative investigations is JAGINST 5800.7C, *The Manual of the Judge Advocate General*, also known as the "JAGMAN." It divides administrative investigations into more specific types than AR 15-6.

Investigations in all services follow similar basic concepts. In the joint environment, the goal, of course, is to prepare an investigation that meets the substantive standards of all the services involved. Detailed analysis of Air Force and Navy Investigation requirements is beyond the scope of this chapter. Reference to those services' policies is for clarification only. Legal advisors should turn to the appropriate Service authorities for detailed guidance.

F. General.

1. Function and Purpose. The primary purpose of an investigation or board of officers is to look into and report on the matters that the appointing authority has designated for inquiry. The report will include findings of fact and recommendations. Often, when criminal misconduct is suspected, it may be more appropriate to conduct an R.C.M. 303 preliminary inquiry or to have either the military police, Criminal Investigation Division, or other appropriate law enforcement authorities conduct the investigation.
2. Methods. An administrative fact-finding procedure under AR 15-6 may be designated an investigation or a board of officers. The proceedings may be informal or formal. Proceedings that involve a single officer using the informal procedures are designated investigations. Proceedings that involve more than one investigating officer using formal or informal procedures or a single investigating officer using formal procedures are designated boards of officers. The Navy term for informal investigations is "command investigation," or "CI." The Air Force term is "Command Directed Investigations," or "CDI."
3. Uses. No service requires as a blanket rule that an investigation be conducted before taking adverse administrative action. But, if inquiry is made under AR 15-6 or other general investigative authority, the findings and recommendations may be used in any administrative action against an individual. An adverse administrative action does not include actions taken pursuant to the Uniform Code of Military Justice (UCMJ) or the Manual for Courts-Martial (MCM).

G. The appointing authority must determine, based on the seriousness and complexity of the issues and the purpose of the inquiry, whether to designate an investigation or a board of officers to conduct the inquiry.

1. Investigation. Conducted by a single investigating officer using informal procedures. An investigation would be appropriate for relatively simple matters. It could also be useful in a serious matter to conduct a preliminary inquiry to be followed by a formal proceeding.
2. When more than one fact-finder is appointed, whether formal or informal procedures are used, they will be designated a board of officers. Additionally, a single fact-finder will be designated a board when formal procedures are to be used.

Informal Procedures. An informal investigation or board may use whatever method it finds most efficient and effective for acquiring information. For example, the board may divide witnesses, issues, or evidentiary aspects of the inquiry among its members for individual investigation and development, holding no collective meeting until ready to review all the information collected. Evidence may be taken telephonically, by mail, or in whatever way the board deems appropriate. A respondent shall not be designated when informal procedures are used and no one is entitled to the rights of a respondent. Before beginning an informal investigation, an investigating officer reviews all written materials provided by the appointing authority and consults with a servicing staff or command judge advocate to obtain appropriate legal guidance. Some of the most important services a judge advocate can perform include assisting the investigating officer in developing an investigative plan, and providing advice during the conduct of the investigation on what the evidence establishes what areas might be fruitful to pursue, and the necessity for rights warnings.

Formal Procedures. The board will meet in full session to take evidence. Definite rules of procedure will govern the proceedings. Depending on the subject matter under investigation, these procedural rules will be found in AR 15-6 (chapter 5), the specific regulation governing the investigation, or both. The Air Force presents guidance for formal investigations in AFI 51-602, *Boards of Officers*. The Navy's guidance appears in JAGINST 5830.1, *Procedures Applicable to Courts of Inquiry and Administrative Fact-Finding Bodies that Require a Hearing*.

When a respondent is designated, a hearing must be held. A respondent may be designated when the appointing authority desires to (or other regulations require) a hearing for a person with a direct interest in the proceeding. Important benefits inure to a respondent, such as the right to be present at board sessions, representation by counsel, and opportunity to present witnesses and cross-examine Government witnesses. The mere fact that an adverse finding may be made or adverse action recommended against a person, however, does not mean that he or she should be designated a respondent. If a respondent is designated, formal procedures must be used. For example, a board of officers considering an enlisted soldier for separation under AR 635-200 must use formal procedures. Due to the considerable administrative burden of using formal procedures, they are rarely used unless required by other regulations. Proper conduct of formal investigations depends on the purpose of the investigation, and is beyond the scope of this chapter.

Authority to Appoint an investigation or board (AR 15-6, Chapter 2)

- H. Formal. After consultation with the servicing judge advocate or legal advisor, the following individuals may appoint a formal board of officers in the Army:
1. Any general court-martial convening authority (GCMCA) or special court-martial convening authority (SPCMCA), including those who exercise that authority for administrative purposes only;
 2. Any general officer;
 3. Any commander or principal staff officer in the grade of colonel or above at the installation, activity, or unit level;
 4. Any State adjutant general; or
 5. A Department of the Army civilian supervisor permanently assigned to a position graded as a GS/GM-14 or above and who is assigned as the head of an Army agency or activity or as a division or department chief. In the Air Force, the appointment authority for boards of officers varies with the regulatory authority for convening the board. In the Navy, an officer in command may convene a board. The General Court Martial Convening Authority takes charge in case of a "major incident."
- I. Informal investigations or boards may be appointed by:
1. Any officer authorized to appoint a formal board or investigation.
 2. A commander at any level. In the Air Force, the commander must be on "G" series orders granting UCMJ authority over the command. In the Navy, a commanding officer or an officer in charge may convene a CI.
 3. (In the Army) A principal staff officer or supervisor in the grade of major or above.
- J. Selection of members. In the Army, if the appointing authority is a general officer, he may delegate the selection of board members to members of his staff.
- K. Limitation. In investigations under AR 15-6, only a GCMCA may appoint an investigation or board for incidents resulting in property damage of \$1M or more, the loss/destruction of an Army aircraft or missile, or an injury/illness resulting in or likely to result in death or permanent total disability. A copy of any investigation involving a fratricide/friendly fire incident will be forwarded after action by the appointing authority to the next higher Army headquarters.

Function of Investigations and Boards of Officers (AR 15-6, para. 1-5)

The primary function of any investigation or board of officers is to ascertain facts and report them to the appointing authority. It is the duty of the investigating officer or board to ascertain and consider the evidence on all sides of each issue thoroughly and impartially and to make findings and recommendations that are warranted by the facts and that comply with the instructions of the appointing authority.

Method of Appointment (AR 15-6, para. 2-1b)

Informal Army investigations and boards may be appointed either orally or in writing. Air Force CDIs and Navy CIs must be appointed in writing. Formal boards will be appointed in writing but, when necessary, may be appointed orally and later confirmed in writing. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation or board and the nature of the findings and recommendations required. The governing regulation should be specified and any special instructions should be detailed.

If the board or investigation is appointed in writing, a Memorandum of Appointment will be used. Note that the Memorandum of Appointment must include certain information—the specific regulation or directive under which the board is appointed, the purpose of the board, the scope of the board's investigatory power, and the nature of the findings and recommendations required. The scope of the board's power is very important because a board has no power beyond that vested in it by the appointing authority. A deficiency in the memorandum may nullify the proceedings for lack of jurisdiction. If this occurs, AR 15-6, para. 2-3c, should be consulted. It may be possible for the appointing authority to ratify the board's action.

The memorandum also names the parties to and designates their roles in the board proceeding. If the board were appointed specifically to investigate one or more known respondents, the respondent(s) would also be named in the Memorandum of Appointment.

Choosing the Informal AR 15-6 Officer

The 15-6 investigating officer (IO) must meet Service regulatory requirements, and should also be assigned based on age, education, training, experience, length of service, and temperament. In the Army, the IO must be a commissioned or warrant officer, or a civilian GS-13 or above, senior to any likely subjects of the investigation. In the naval services, most command investigations will be conducted by a commissioned officer. However, a warrant officer, senior enlisted person, or civilian employee may be used when the convening authority deems it appropriate. The Air Force specifies no minimum grade for CI investigators.

Both the Army and the Air Force require the IO to consult with a JA for guidance before beginning an informal investigation. The Naval services only require such consultation when the investigation is intended as a litigation report or when directed by the appointing authority. This consultation provides a good opportunity to provide a written investigative guide to the IO. The Army OTJAG Investigating Officer's Guide is included here as an appendix. The Naval Justice School has a similar publication, JAGMAN Investigations Handbook. The Air Force publishes the Air Force Commander-Directed Investigations Guide (on the world wide web at www.ig.ha.af.mil).

Conducting the Informal Investigation

The IO, with the assistance of the JA advisor, must formulate an investigation plan that takes into account both legal concerns and tactical effectiveness. Each investigation will be different, but the following factors should be considered:

1. Purpose of the Investigation: Need to carefully consider the guidance of the appointment memorandum on purpose and timeline.
2. Facts known
3. Potential witnesses

4. Securing physical and documentary evidence
5. Possible criminal implications? (including need for Article 31, UCMJ warnings)
6. Civilian witness considerations (securing non-military witness information, giving appropriate rights to collective bargaining unit members)
7. Regulations and statutes involved
8. Order of witness interviews
9. Chronology

Continued meetings between the IO and the legal advisor will allow proper adjustments to the investigative plan as the investigation progresses, and allow for proper ongoing coordination with the appointing authority.

Findings and Recommendations

The report of investigation contains two final products—the findings and the recommendations.

- L. **Report Structure.** Navy CI and Air Force CDI reports begin with narrative information from the investigating officer
 1. Navy investigations begin with a preliminary statement. It tells how all reasonably available evidence was collected or is forthcoming, whether each directive of the convening authority has been met, difficulties encountered, and any other information necessary for a complete understanding of the case.
 2. Air Force CDI reports of investigation begin with a discussion of the authority and scope of the investigation. They continue with an introduction providing background, a description of the allegations, and a “bottom line up front” conclusion on whether the allegations were substantiated or not.
 3. Army informal investigations normally begin with DA Form 1574, which provides a “fill in the box” guide to procedures followed during the investigation.
- M. **Findings.** A finding is a clear, concise statement of fact readily deduced from evidence in the record. Findings include negative findings (i.e. that an event did not occur). Findings should refer to specific supporting evidence with citations to the record of investigation. Findings must be supported by the preponderance of the evidence. Factors such as demeanor, imputed knowledge, and ability to recall may be considered by the IO. Finally, findings must also address the issues raised in the appointment memorandum.
- N. **Recommendations.** Recommendations must be consistent with the findings, and must thus be supported by the record of investigations. Air Force CDIs and Navy CIs will not contain recommendations unless specifically requested by the convening authority.

Legal Review and Action by the Appointing Authority

The completed report of investigation should, as a practical matter, always receive legal review. In fact, AR 15-6 requires legal review of Army investigations where adverse administrative action may result, the report will be relied upon by higher headquarters, death or serious bodily injury resulted, or any case involving serious or complex matters. The Air Force requires legal review of investigation CDIs that are not simply “diagnostic” to ensure compliance with applicable regulations and law. The Navy neither requires nor precludes legal review.

An attorney other than the advisor to the investigating officer should conduct the review. In the Army, that review will focus on whether the proceedings complied with legal requirements, what effects any errors would have, whether sufficient evidence supports the findings, and whether the recommendations are consistent with the findings.

After reviewing the report of investigation, the appointing authority has three options. First, of course, the appointing authority can approve the report as is. The appointing authority can return the report for additional investigation, either with the same or with a new investigating officer. Finally, the appointing authority can substitute findings and recommendations. The record must support any substituted findings and recommendations.

Unless otherwise provided in other regulations, the appointing authority is not bound by the findings or regulations. The appointing authority may also consider information outside the report of investigation in making personnel, disciplinary, or other decisions.

APPENDIX

ARMY REGULATION 15-6

INVESTIGATION GUIDE

FOR

INFORMAL INVESTIGATIONS

JANUARY, 1997

INTRODUCTION

1. PURPOSE:

a. This guide is intended to assist investigating officers, who have been appointed under the provisions of Army Regulation (AR) 15-6, in conducting timely, thorough, and legally sufficient investigations. It is designed specifically for informal investigations, but some provisions are applicable to formal investigations. Legal advisors responsible for advising investigating officers may also use it. A brief checklist is included at the end of the guide as an enclosure. The checklist is designed as a quick reference to be consulted during each stage of the investigation. The questions in the checklist will ensure that the investigating officer has covered all the basic elements necessary for a sound investigation.

b. This guide includes the changes implemented by Change 1 to AR 15-6. Many of those changes are significant; consequently, the information in the guide based on the changes is italicized.

2. DUTIES OF AN INVESTIGATING OFFICER: The primary duties of an investigating officer are:

a. To ascertain and consider the evidence on all sides of an issue,

b. To be thorough and impartial,

c. To make findings and recommendations warranted by the facts and comply with the instructions of the appointing authority, and

d. To report the findings and recommendations to the appointing authority.

3. AUTHORITY:

a. AR 15-6 sets forth procedures for the conduct of informal and formal investigations. Only informal investigations will be discussed here. Informal investigations are those that usually have a single investigating officer who conducts interviews and collects evidence. In contrast, formal investigations normally involve due process hearings for a designated respondent. Formal procedures are required whenever a respondent is designated.

b. Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation. Since no respondents are designated in informal procedures, no one is entitled to the rights of a respondent, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The investigating officer may, however, make any relevant findings or recommendations concerning individuals, even where those findings or recommendations are adverse to the individual or individuals concerned.

c. AR 15-6 is used as the basis for many investigations requiring the detailed gathering and analyzing of facts, and the making of recommendations based on those facts. AR 15-6 procedures may be used on their own, such as in an investigation to determine facts and circumstances, or the procedures may be incorporated by reference into directives governing specific types of investigations, such as reports of survey and line of duty investigations. If such directives contain guidance that is more specific than that set forth in AR 15-6 or these procedures, the more specific guidance will control. For example, AR 15-6 does not contain time limits for completion of investigations; however, if another directive that incorporates AR 15-6 procedures contains time limits, that requirement will apply.

d. Only commissioned officers, warrant officers, *or DA civilian employees paid under the General Schedule, Level 13 (GS 13), or above* may be investigating officers. The investigating officer must also be senior to any person that is part of the investigation if the investigation may require the investigating officer to make adverse findings or recommendations against that person. Since the results of any investigation may have a significant impact on policies, procedures, or careers of government personnel, *the appointing authority should select the best qualified person for the duty based on their education, training, experience, length of service, and temperament.*

PRELIMINARY MATTERS

1. Appointing authority.

a. Under AR 15-6, the following persons may appoint investigating officers for informal investigations:

- any general court-martial convening authority, including those who have such authority for administrative purposes only,

- any general officer,

- a commander at any level,

- a principal staff officer or supervisor in the grade of major or above,

- any state adjutant general, and

- a DA civilian supervisor paid under the Executive Schedule, SES, or GS/GM 14 or above, provided the supervisor is the head of an agency or activity or the chief of a division or department.

b. Only a general court-martial convening authority may appoint an investigation for incidents resulting in property damage of \$1,000,000, the loss or destruction of an Army aircraft or missile, an injury or illness resulting in, or likely to result in, total disability, or the death of one or more persons.

2. Appointment procedures. Informal investigation appointments may be made orally or in writing. If written, the appointment orders are usually issued as a memorandum signed by the appointing authority or by a subordinate with the appropriate authority line. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation and the nature of the findings and recommendations required. If the orders are unclear, the investigating officer should seek clarification. The primary purpose of an investigation is to report on matters that the appointing authority has designated for inquiry. The appointment orders may also contain specific guidance from the appointing authority, which, even though not required by AR 15-6, nevertheless must be followed. For example, AR 15-6 does not require that witness statements be sworn for informal investigations; however, if the appointing authority requires this, all witness statements must be sworn.

3. Obtaining assistance. The servicing Judge Advocate office can provide assistance to an investigating officer at the beginning of and at any time during the investigation. Investigating officers should always seek legal advice as soon as possible after they are informed of this duty and as often as needed while conducting the investigation. In serious or complex investigations for which a legal review is mandatory, this requirement should be included in the appointment letter. Early coordination with the legal advisor will allow problems to be resolved before they are identified in the mandatory legal review. The legal advisor can assist an investigating officer in framing the issues, identifying the information required, planning the investigation, and interpreting and analyzing the information obtained. The attorney's role, however, is to provide legal advice and assistance, not to conduct the investigation or substitute his or her judgment for that of the investigating officer. NOTE: *Complex and sensitive cases include those involving a death or serious bodily injury, those in which findings and recommendations may result in adverse administrative action, and those that will be relied upon in actions by higher headquarters.*

4. Administrative matters. As soon as the investigating officer receives appointing orders, he or she should begin a chronology showing the date, time, and a short description of everything done in connection with the investigation. The chronology should begin with the date orders are received, whether verbal or written. Investigating officers should also record the reason for any unusual delays in processing the case, such as the absence of witnesses due to a field training exercise. The chronology should be part of the final case file.

5. Concurrent investigations. An informal investigation may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency. Appointing authorities and investigating officers must ensure that investigations do not hinder or interfere with criminal investigations or investigations directed

by higher headquarters. In cases of concurrent investigations, investigating officers should coordinate with the other command or agency to avoid duplication of effort wherever possible. If available, the results of other investigations may be incorporated into the AR 15-6 investigation and considered by the investigating officer. Additionally, an investigating officer should immediately coordinate with the legal advisor if he or she discovers evidence of serious criminal misconduct.

CONDUCTING THE INVESTIGATION

1. Developing an investigative plan.

a. The investigating officer's primary duty is to gather evidence, and make findings of fact and appropriate recommendations to the appointing authority. Before obtaining information, however, the investigating officer should develop an investigative plan that consists of (1) an understanding of the facts required to reach a conclusion, and (2) a strategy for obtaining evidence. This should include a list of potential witnesses and a plan for when each witness will be interviewed. The order in which witnesses are interviewed may be important. An effective, efficient method is to interview principal witnesses last. This best prepares the investigating officer to ask all relevant questions and minimizes the need to re-interview these critical witnesses. As the investigation proceeds, it may be necessary to review and modify the investigative plan.

b. The investigating officer should begin the investigation by identifying the information already available, and determining what additional information will be required before findings and recommendations may be made to the appointing authority. An important part of this is establishing the appropriate standards, rules, or procedures that govern the circumstances under investigation. The legal advisor or other functional expert can assist the investigating officer in determining the information that will be required.

2. Obtaining documentary and physical evidence.

a. The investigating officer may need to collect documentary and physical evidence such as applicable regulations, existing witness statements, accident or police reports, and photographs. This information can save valuable time and effort. Accordingly, the investigating officer should obtain this information at the beginning of the investigation. In some cases, the information will not be readily available, so the request should be made early so the investigating officer may continue to work on other aspects of the investigation while the request is being processed. The investigating officer should, if possible and appropriate, personally inspect the location of the events being investigated and take photographs, if they will assist the appointing authority.

b. A recurring problem that must be avoided is lack of documentation in investigations with findings of no fault, no loss, or no wrongdoing. It is just as important to back these findings up with documentary evidence as it is to document adverse findings. All too frequently an investigating officer who makes a finding of no fault, no loss, or no wrongdoing, closes the investigation with little or no documentation. This is incorrect. The report of investigation must include sufficient documentation to convince the appointing authority and others who may review the investigation that the evidence supports the finding of no fault, no loss, or no wrongdoing.

3. Obtaining witness testimony.

a. In most cases, witness testimony will be required. Clearly, the best interviews occur face-to-face; but, if necessary, interviews may be conducted by telephone or mail. Because of the preference for face-to-face interviews, telephone and mail interviews should be used only in unusual circumstances. Information obtained telephonically should be documented in a memorandum for record.

b. Witness statements should be taken on DA Form 2823. Legible handwritten statements and/or questions and answers are ordinarily sufficient. If the witness testimony involves technical terms that are not generally known outside the witness's field of expertise, the witness should be asked to define the terms the first time they are used.

c. Although AR 15-6 does not require that statements be sworn for informal investigations, the appointing authority, or other applicable regulation, may require sworn statements, or the investigating officer may, at his or her own discretion, ask for sworn statements, even where not specifically required. Under Article 136, UCMJ, military officers are authorized to administer the oath required to provide a sworn statement; 5 U.S.C. § 303 provides this authority for civilian employees. (Statements taken out of the presence of the investigating officer may be sworn before an official authorized to administer oaths at the witness's location.)

d. Investigating officers do not have the authority to subpoena witnesses, and their authority to interview civilian employees may be subject to certain limitations. Prior to interviewing civilians, the investigating officer should discuss this matter with the local Labor Counselor. Commanders and supervisors, however, have the authority to order military personnel and to direct Federal employees to appear and testify. Civilian witnesses who are not Federal employees may agree to appear, and, if necessary, be issued invitational travel orders. This authority should be used only if the information cannot be otherwise obtained and only after coordinating with the legal advisor or appointing authority.

4. Rights Advisement.

a. All soldiers suspected of criminal misconduct must first be advised of their rights. DA Form 3881 should be used to record that the witness understands his or her rights and elects to waive those rights and make a statement. It may be necessary to provide the rights warning at the outset of the interview. In some cases, however, an investigating officer will become aware of the witness's involvement in criminal activity only after the interview has started and incriminating evidence is uncovered. In such case, rights warnings must be provided as soon as the investigating officer suspects that a witness may have been involved in criminal activity. If a witness elects to assert his or her rights and requests an attorney, all questioning must cease immediately. Questioning may only resume in the presence of the witness's attorney, if the witness consents to being interviewed.

b. Note that these rights apply only to information that might be used to incriminate the witness. They cannot be invoked to avoid questioning on matters that do not involve violations of criminal law. Finally, only the individual who would be accused of the crime may assert these rights. The rights cannot be asserted to avoid incriminating other individuals. The following example highlights this distinction.

c. Example: A witness who is suspected of stealing government property must be advised of his or her rights prior to being interviewed. However, if a witness merely is being interviewed concerning lost or destroyed government property in connection with a Report of Survey, a rights warning would not be necessary unless evidence is developed that leads the investigating officer to believe the individual has committed a criminal offense. If it is clear that the witness did not steal the property but has information about who did, the witness may not assert rights on behalf of the other individual.

5. Scheduling witness interviews. The investigating officer will need to determine which witnesses should be interviewed and in what order. Often, information provided by one witness can raise issues that should be discussed with another. Organizing the witness interviews will save time and effort that would otherwise be spent "backtracking" to re-interview prior witnesses concerning information provided by subsequent witnesses. While re-interviewing may be unavoidable in some circumstances, it should be kept to a minimum. The following suggests an approach to organizing witness interviews; it is not mandatory.

- When planning who to interview, work from the center of the issue outward. Identify the people who are likely to provide the best information. When conducting the interviews, start with witnesses that will provide all relevant background information and frame the issues. This will allow the interviews of key witnesses to be as complete as possible, avoiding the "backtracking" described above.

- Concentrate on those witnesses who would have the most direct knowledge about the events in question. Without unnecessarily disclosing the evidence obtained, attempt to seek information that would support or refute information already obtained from others. In closing an interview, it is appropriate to ask if the witness knows of any other persons who might have useful information or any other information the witness believes may be relevant to the inquiry.

- Any information that is relevant should be collected regardless of the source; however, investigating officers should collect the best information available from the most direct source.

- It may be necessary or advisable to interview experts having specialized understanding of the subject matter of the investigation.

- At some point, there will be no more witnesses available with relevant and useful information. It is not necessary to interview every member of a unit, for example, if only a few people have information relevant to the inquiry. Also, all relevant witnesses do not need to be interviewed if the facts are clearly established and not in dispute. However, the investigating officer must be careful not to prematurely terminate an investigation because a few witnesses give consistent testimony.

6. Conducting witness interviews. Before conducting witness interviews, investigating officers may consult Inspector General officials or law enforcement personnel such as Military Police officers or Criminal Investigation Division agents for guidance on interview techniques. The following suggestions may be helpful:

- Prepare for the interview. While there is no need to develop scripts for the witness interviews, investigating officers may wish to review the information required and prepare a list of questions or key issues to be covered. This will prevent the investigating officer from missing issues and will maximize the use of the officer's and witness's time. Generally, it is helpful to begin with open-ended questions such as "Can you tell me what happened?" After a general outline of events is developed, follow up with narrow, probing questions, such as "Did you see SGT X leave the bar before or after SGT Y?" Weaknesses or inconsistencies in testimony can generally be better explored once the general sequence of events has been provided.

- Ensure the witness's privacy. Investigating officers should conduct the interview in a place that will be free from interruptions and will permit the witness to speak candidly without fear of being overheard. Witnesses should not be subjected to improper questions, unnecessarily harsh and insulting treatment, or unnecessary inquiry into private affairs.

- Focus on relevant information. Unless precluded for some reason, the investigating officer should begin the interview by telling the witness about the subject matter of the investigation. Generally, any evidence that is relevant and useful to the investigation is permissible. The investigating officer should not permit the witness to get off track on other issues, no matter how important the subject may be to the witness. Information should be material and relevant to the matter being investigated. Relevancy depends on the circumstances in each case. Compare the following examples:

Example 1: In an investigation of a loss of government property, the witness's opinions concerning the company commander's leadership style normally would not be relevant.

Example 2: In an investigation of alleged sexual harassment in the unit, information on the commander's leadership style might be relevant.

Example 3: In an investigation of allegations that a commander has abused command authority, the witness's observation of the commander's leadership style would be highly relevant.

- Let the witness testify in his or her own words. Investigating officers must avoid coaching the witness or suggesting the existence or non-existence of material facts. After the testimony is completed, the investigating officer should assist the witness in preparing a written statement that includes all relevant information, and presents the testimony in a clear and logical fashion. Written testimony also should reflect the witness's own words and be natural. Stilted "police blotter" language is not helpful and detracts from the substance of the testimony. A tape recorder may be used, but the witness should be advised of its use. Additionally, the tape should be safeguarded, even after the investigation is completed.

- Protect the interview process. In appropriate cases, an investigating officer may direct witnesses not to discuss their statement or testimony with other witnesses or with persons who have no official interest in the proceedings until the

investigation is complete. This precaution is recommended to eliminate possible influence on testimony of witnesses still to be heard. Witnesses, however, are not precluded from discussing matters with counsel.

7. Rules of Evidence: Because an AR 15-6 investigation is an administrative and not a judicial action, the rules of evidence normally used in court proceedings do not apply. Therefore, the evidence that may be used is limited by only a few rules.

- The information must be relevant and material to the matter or matters under investigation.

- Information obtained in violation of an individual's Article 31, UCMJ, or 5th Amendment rights may be used in administrative proceedings unless obtained by unlawful coercion or inducement likely to affect the truthfulness of the statement.

- The result of polygraph examinations may be used only with the subject's permission.

- Privileged communications between husband and wife, priest and penitent, attorney and client may not be considered, and present or former inspector general personnel will not be required to disclose the contents of inspector general reports, investigations, inspections, action requests, or other memoranda without appropriate approval.

- "Off-the-record" statements are not acceptable.

- An involuntary statement by a member of the Armed Forces regarding the origin, incurrence, or aggravation of a disease or injury may not be admitted.

The investigating officer should consult the legal advisor if he or she has any questions concerning the applicability of any of these rules.

8. Standard of Proof. Since an investigation is not a criminal proceeding, there is no requirement that facts and findings be proven beyond a reasonable doubt. Instead, unless another specific directive states otherwise, AR 15-6 provides that findings must be supported by "a greater weight of evidence than supports a contrary conclusion." That is, findings should be based on evidence that, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion.

CONCLUDING THE INVESTIGATION

1. Preparing Findings and Recommendations. After all the evidence is collected, the investigating officer must review it and make findings. The investigating officer should consider the evidence thoroughly and impartially, and make findings of fact and recommendations that are supported by the facts and comply with the instructions of the appointing authority.

- **Facts:** To the extent possible, the investigating officer should fix dates, places, persons, and events, definitely and accurately. The investigating officer should be able to answer questions such as: What occurred? When did it occur? How did it occur? Who was involved, and to what extent? Exact descriptions and values of any property at issue in the investigation should be provided.

- **Findings:** A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, investigating officers are permitted to rely on the facts and any reasonable inferences that may be drawn from those facts. In stating findings, investigating officers should refer to the exhibit or exhibits relied upon in making each finding. The documented evidence that will become part of the report must support findings (including findings of no fault, no loss, or no wrongdoing). Exhibits should be numbered in the order they are discussed in the findings.

- Recommendations: Recommendations should take the form of proposed courses of action consistent with the findings, such as disciplinary action, imposition of financial liability, or corrective action. Recommendations must be supported by the facts and consistent with the findings. Each recommendation should cite the specific findings that support the recommendation.

2. Preparing the Submission to the Appointing Authority. After developing the findings and recommendations, the investigating officer should complete DA Form 1574 and assemble the packet in the following order:

- appointing order,
- initial information collected,
- rights warning statements,
- chronology, and
- exhibits (with an index).

3. **LEGAL REVIEW:**

a. AR 15-6 does not require that all informal investigations receive legal review. The appointing authority, however, must get a legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied on in actions by higher headquarters. Nonetheless, appointing authorities are encouraged to obtain legal review of all investigations. Other specific directives may also require a legal review. Generally, the legal review will determine:

- whether the investigation complies with requirements in the appointing order and other legal requirements,
- the effects of any errors in the investigation,
- whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by sufficient evidence, and
- whether the recommendations are consistent with the findings.

b. If a legal review is requested or required, it is required before the appointing authority approves the findings and recommendations. After receiving a completed AR 15-6 investigation, the appointing authority may approve, disapprove, or modify the findings and recommendations, or may direct further action, such as the taking of additional evidence, or making additional findings.

CHECKLIST FOR INVESTIGATING OFFICERS

1. **Preliminary Matters:**

- a. Has the appointing authority appointed an appropriate investigating officer based on seniority, availability, experience, and expertise?
- b. Does the appointment memorandum clearly state the purpose and scope of the investigation, the points of contact for assistance (if appropriate), and the nature of the findings and recommendations required?
- c. Has the initial legal briefing been accomplished?

2. Investigative Plan.

- a. Does the investigative plan outline the background information that must be gathered, identify the witnesses who must be interviewed, and order the interviews in the most effective manner?
- b. Does the plan identify witnesses no longer in the command and address alternative ways of interviewing them?
- c. Does the plan identify information not immediately available and outline steps to quickly obtain the information?

3. Conducting the Investigation.

- a. Is the chronology being maintained in sufficient detail to identify causes for unusual delays?
- b. Is the information collected (witness statements, MFRs of phone conversations, photographs, etc.) being retained and organized?
- c. Is routine coordination with the legal advisor being accomplished?

4. Preparing Findings and Recommendations.

- a. Is the evidence assembled in a logical and coherent fashion?
- b. Does the evidence support the findings (including findings of no fault, no loss, or no wrongdoing)? Does each finding cite the exhibits that support it?
- c. Are the recommendations supported by the findings? Does each recommendation cite the findings that support it?
- d. Are the findings and recommendations responsive to the tasking in the appointment memorandum?
- e. Did the investigation address all the issues (including systemic breakdowns; failures in supervision, oversight, or leadership; program weaknesses; accountability for errors; and other relevant areas of inquiry) raised directly or indirectly by the appointment?

5. Final Action.

- a. Was an appropriate legal review conducted?
- b. Did the appointing authority approve the findings and recommendations? If not, have appropriate amendments been made and approved?

